

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROL OVERTOOM	:	CIVIL ACTION
	:	
vs.	:	
	:	
ANTHONY J. PRINCIPI	:	NO. 02-1913
Secretary of the Department	:	
of Veterans Affairs	:	

**MEMORANDUM**

ROBERT F. KELLY, Sr. J.

MARCH 5, 2003

This is an employment discrimination case. The plaintiff, Carol Overtoom, (Overtoom or plaintiff) is a registered nurse. She began her employment with the Department of Veterans Affairs (DVA) at the Philadelphia Medical Center (VAMC) in November 1991.

Complaint ¶ 9.

After Overtoom started working there, the VAMC conducted a reorganization. The purpose of the reorganization was to consolidate what were known as “services” into a lesser number of “product lines.” The product line pertinent to this case is the Surgical Care Product Line, and within it, the Short Procedure Unit (SPU).

The Short Procedure Unit, in turn, was divided into functions, which were pre-screening, pre-opt and post-opt. In 1999, plaintiff was one of two registered nurses assigned to the pre-screening function in the Short Procedure Unit. At that time she had been assigned to the pre-screening function for more than three years, Complaint ¶ 20. The screening function was largely administrative in nature, and required little hands-on care of patients.

In December 1999 a nursing manager advised Overtoom that she, Overtoom, like other nurses in the Short Procedure Unit, would begin rotating from pre-screening through the

other functions in the unit (that is pre-opt and post-opt, complaint ¶ 20). The purpose of the rotation was to cross-train all of the registered nurses in the Short Procedure Unit in all three functions, and thereby enable the management to utilize nurses assigned to one function in another part of the SPU as required. See Affidavit of Nursing Director Annette G. Nelson. Overtoom objected to the rotation because she wanted no part of “bedside” patient care which would have been particularly required of post-opt procedures. Overtoom’s explanation was that she suffered from a condition (“spinal stenosis”) that precluded her from performing almost all functions related to hospital nursing, complaint ¶ 21-23.

In response to her assertions that she was suffering from a medical condition, beginning in January 2000 Overtoom was assigned to a series of “light duty” and other positions which involved no patient care and sometimes no RN skills.

Overtoom’s first light duty assignment was in the Podiatry Clinic starting on January 3, 2000. Her assignment was to sit at a desk and greet incoming veterans. From a sitting position she was required to tilt her head up from the horizontal plane to look up at the veteran before her. The requisite head motion “served to aggravate plaintiff’s disability”. Complaint ¶ 24.

A month later on February 4, 2000 the VAMC assigned Overtoom to non-nursing duties in the Ambulatory Care Processing Station of the Medical Administrative Service (MAS). Complaint ¶ 27. This assignment involved “menial clerical tasks” and Overtoom considered it a humiliation, complaint ¶ 27.

Overtoom complained about this assignment, and on March 3, 2000 she was given a temporary assignment, this time to the Patient Accounts Department, complaint ¶ 32.

Overtoom remained in the Patient Accounts Department for about a year. Complaint ¶ 36. At all times she received the pay of a Registered Nurse. On March 17, 2001 the VAMC reassigned Overtoom to a position in the Surgical Service Department. The Agency characterized the assignment as a “temporary reasonable accommodation”, complaint ¶ 38. Overtoom contends that this assignment, too, was retaliation for protected activity. Complaint ¶ 39. The job involved reviewing “patient education materials”, complaint ¶ 41, and apparently was created expressly to accommodate Overtoom id. (Noting that the assignment was “a newly created position”). The problem with this assignment according to Overtoom, was that it did not entail “any meaningful work to perform”, complaint ¶ 42. Also, Overtoom’s desk was situated in a location where the professional staff “was in position to observe plaintiff sitting at a desk with nothing to do.” Id. In fact, the VAMC went so far as to refuse Overtoom’s request to “enclose [her] cubicle”, complaint ¶ 44. Being forced to sit at a desk in an unenclosed cubicle outside of her supervisor’s office caused Overtoom to suffer stress to her spine “consistently having to look up and greet visitors to the Department.” Complaint ¶ 44.

In the summer of 2001 Overtoom was granted leave pursuant to the Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6. When she returned in August 2001, Overtoom was directed to report to a medical/surgical floor for duty as a staff nurse caring for patients. Nursing Supervisor Dorothy McDonnough consulted with Overtoom as to what duties Overtoom could perform on that floor. Overtoom’s complaint notes that in her almost ten years of employment as a Registered Nurse at the VAMC she had never worked as a “floor nurse” for “in-patient care”, complaint ¶ 47. Overtoom expressed reservation at her own professional ability to perform this function, and also complained that this assignment violated some

restriction on her ability to care for patients. Complaint ¶ 48. When she reported to the floor Overtoom was told that she would not be required to perform the full functions of a floor nurse. Instead, she would be limited to working at the nurse's station "taking patient's signs, and possibly distributing patient's medications." Complaint ¶ 50.

This assignment to a floor nurse position was considered retaliation according to Overtoom because the VAMC knew that she could not perform the duties of a floor nurse. Complaint paragraph 51. At the same time, to the extent that the VAMC exempted Overtoom from the bedside patient care that was performed by other floor nurses, that accommodation was calculated to label Overtoom as "lazy or disinterested in team work and to otherwise poison plaintiff's working relationship with her co-workers . . . ." Id.

After less than a month of light duty work on the medical/surgical floor, in September 2001 Overtoom stopped going to work. After January 2002 she was carried by the VAMC as AWOL, or "absent without leave" due to her failure to justify her absence with medical explanation. In more recent times she has notified the VAMC that she was resigning, effective October 31, 2001. On April 8, 2002 Overtoom filed the instant complaint. In it she contends that the VAMC discriminated against her because she was disabled, has a record of being disabled, or is perceived to be disabled (all three bases are alleged in the alternative) under the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq. (Rehab Act) (Count I of the complaint).

Count II of the complaint alleges that VAMC's attempts to accommodate her inability to function as a staff nurse were actually retaliation under the Rehab Act.

Count III alleges retaliation under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.

Count IV alleges a violation of the Rehab Act in that Overtoom was “constructively discharged.”

The government has moved to dismiss the FMLA count (Count III) for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

The government also moves for summary judgment on Counts I, II and IV.

GOVERNMENT’S MOTION WITH REGARD TO COUNT III

Defense first contends that federal employees have no private right of action under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 et seq. as alleged in Count III of the complaint.

This motion is filed under Fed. R. Civ. P. 12(b)(6). Because the defendant has already filed an answer to the complaint 12(b)(6) is not the appropriate motion. We will treat this as a 12(c) Motion for Judgment on the Pleadings. Plaintiff has failed to respond to this motion despite a phone call from chambers on December 16, 2002 inquiring about a response. The response was due on November 30, 2002.

In any event, defendants allegation is correct in that there is no private right of action. Count III of the complaint will therefore be dismissed.

SUMMARY JUDGMENT AS TO COUNT I

Count I of plaintiff’s complaint alleges disability discrimination under the Rehab Act. For federal employees the Rehabilitation Act, 29 U.S.C. §§ 791, 794(a) is the exclusive remedy for discrimination based on disability. “There are two distinct types of claims under the ADA - Disparate Treatment Claims and Failure to Accommodate Claims.” Taylor v. Phoenixville Sch. Dist., 113 F.Supp. 2d 770, 776 n.3 (E.D.P.A. 2000). Plaintiff’s complaint in

Count I appears to make both disparate treatment and failure to accommodate claims.

In order for plaintiff to establish a *prima facie* case of disparate treatment under the Rehab Act, plaintiff must show that (1) she is a disabled person within the meaning of the statute; (2) she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) she has suffered an otherwise adverse employment decision as a result of discrimination. See Shaner v. Synthes (USA) 204 F.3d 494, 500 (3d Cir. 2000).

An adverse employment action must result in serious tangible harm which alters an employee's compensation, terms, conditions or privileges of employment. See Burlington Indus., Inc. v. Ellerth 524 U.S. 742, 749 (1998). As defendant points out in its motion for summary judgment the complaint makes no factual assertion that Overtoom's pay, benefits, hours of employment, or other terms of employment were ever changed, from the time that she notified the VMAC that she was disabled until 2001 when she stopped coming to work. The Affidavit filed with the motion for summary judgment from Nursing Director Annette Nelson is conclusive on that point. Because plaintiff has failed to file a response to this allegation we accept it as true and find that the complaint does not allege an adverse action taken against her, plaintiff cannot therefore establish a *prima facie* case under the Rehab Act and summary judgment will therefore be granted on that claim.

As to plaintiff's failure to accommodate case, plaintiff must prove (1) that she is an individual with a disability under the statute; (2) that she can perform the essential functions of her position with accommodation; (3) that her employer had notice of her alleged disability; and (4) the employer failed to accommodate her. Rhoads v. F.D.I.C. 257 F.3d 373, 387 n.11 (4<sup>th</sup>

Cir. 2001). If anyone of these elements is not present, the claim fails.

In this case, plaintiff's complaint concedes that the VAMC repeatedly accommodated her unwillingness to work in any job requiring patient care, including assigning her to jobs requiring little or no physical motion or effort. Overtom's "failure to accommodate" claim is grounded on the fact that she was not restored to her essentially administrative job in the Pre-screening Section in the Short Procedures Unit; as the defendant's motion points out the complaint repeats that assertion on not less than eight occasions.

An employer can make a "reasonable accommodation" for a disabled worker without acceding to the disabled employees demand for a specific job. See 29 CFR § 1630.2(p)(1); EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943, 951 (7<sup>th</sup> Cir. 2001). Any reasonable accommodation is sufficient to meet its accommodation obligation. Overtom's argument is straight forward; if she were willing and able to work she would work only in the Pre-screening Section in the Short Procedures Unit, without the required rotation. She cannot perform most staff nurse assignments although she was paid as a staff nurse throughout her tenure at the VAMC. On the other hand, neither a "menial" clerical job nor any other accommodation including a job with no duties at all, suits her, even at full pay. Basically her argument is that she could have remained in the Pre-screening Section, exempt from the required rotation and the failure to leave her in that Section somehow violates the Rehab Act.

Because her contention fails to state a *prima facie* case of "failure to accommodate", the VAMC is entitled to summary judgment on Count I of the complaint.

#### SUMMARY JUDGMENT AS TO COUNT II OF THE COMPLAINT

In Count II, plaintiff asserts that the VAMC "retaliated" against her for exercising

her rights in that the Medical Center “subjected plaintiff to adverse employment actions based on her disability” and failed to “afford plaintiff a reasonable accommodation”; complaint ¶ 71.

In order to establish a prima facie case of illegal retaliation under the Rehab Act, a plaintiff must show : “(1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employees protected activity; and (3) a causal connection between the employees protected activity and the employers action.” Fogelman v. Mercy Hospital Inc., 283 F.3d 561, 567-68 (3d Cir. 2002).

As defense has pointed out in its motion for summary judgment, discovery is closed and Overtoom has proffered no probative evidence of adverse action, either in the terms and conditions of her employment or in any failure to accommodate her disability. Furthermore, Overtoom has not responded to the allegations contained in defendant’s motion for summary judgment. Overtoom therefore cannot maintain a retaliation claim for the same reason that she cannot establish a discrimination claim. Therefore, summary judgment in favor of VAMC will be entered on Count II of the complaint.

#### SUMMARY JUDGMENT AS TO COUNT IV OF THE COMPLAINT.

Count IV of Overtoom’s complaint alleges construction discharge. In the complaint Overtoom states that intolerable conditions at the VAMC included the fact that she was assigned to four different jobs in three months. Her other evidence of intolerable conditions are suggestions from supervisors that she should look for another job; placing her work space adjacent to her supervisor and declining to inclose it; and alternately giving her no “meaningful work tasks to perform” or, worse, assigning her to “retaliatory . . . floor nursing” which evidently did require “work . . . to perform”, complaint ¶ 77.



In Clowes v. Allegheny Hospital, 991 F.2d 1159 (3d Cir. 1993), the Third Circuit provided factors that a court may take into consideration when analyzing whether constructive discharge in fact occurred. These factors include: reduction of pay or benefits, demotion, suggestions to retire or resign, threats of discharge, involuntary transfer to a less desirable position, altered job responsibilities and unsatisfactory job evaluations. Applying these factors, and as noted in Ms. Nelson's uncontested Affidavit, Overtoom always received the pay and benefits of a registered nurse, even though she filled jobs that did not warrant compensation at that level, in an attempt to accommodate her alleged disability. She was never demoted. Overtoom states that from the date of her hire, she "consistently received satisfactory or hirer employment evaluations." Complaint ¶ 10.

Each of the three assignments in early 2000 were made in response to her complaints about her inability to do the preceding job. Not only were these accommodations not intolerable; Overtoom demanded them.

The comments that Overtoom should look for another job, assuming they were made do not constitute intolerable working conditions. Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 167-68 (3d Cir. 2001).

It is clear from the record that plaintiff, a registered nurse, decided at some point that she no longer wanted to care for patients. We agree with defendant's assertion that VAMC exhibited considerable patience and forbearance in dealing with Overtoom's case. Despite this nothing that the agency did to accommodate Overtoom's attitude was satisfactory to her. We agree with defendant's assertion that filing this complaint under these circumstances was a "cynical misuse of the anti-discrimination laws".

We therefore enter the following Order.

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**ORDER**

**AND NOW**, this 5th day of March, 2003, Defendant's Motion to Dismiss Count III of the Complaint is hereby **GRANTED**. Defendant's Motion for Summary Judgment as to the remaining Counts of the Complaint is hereby **GRANTED**. Costs to be paid by plaintiff.

This case is **ORDERED CLOSED** on the docket.

BY THE COURT:

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ROBERT F. KELLY, Sr. J.